

E-132, 299/SA-89-269ADDRESSING SHOW CAUSE FILING

BEFORE THE MINNESOTA PUBLIC UTILITIES COMMISSION

Barbara Beerhalter	Chair
Cynthia A. Kitlinski	Commissioner
Norma McKanna	Commissioner
Robert J. O'Keefe	Commissioner
Darrel L. Peterson	Commissioner

In the Matter of an Application by the City of Rochester, Minnesota, for an Interim Service Order to Serve a Highway Advertising Sign Owned by Vogel Outdoor Advertising to be Located in the 5800 Block of T.H. 52 North, and Presently Within the Assigned Service Area of People's Cooperative Power Association

ISSUE DATE: August 10, 1989

DOCKET NO. E-132, 299/SA-89-269

ORDER ADDRESSING SHOW CAUSE
FILING

PROCEDURAL HISTORY

In December, 1988, the City of Rochester (City) filed an application with the Minnesota Public Utilities Commission (the Commission) to adjust its service area to include in it all of the areas it has annexed since 1974 and to determine compensation for these areas (Docket No. E-132, 299/SA-88-996). The area involved in this matter, occupied by a highway advertising sign owned by Vogel Outdoor Advertising (Vogel), is included in that application.

On May 1, 1989, the City submitted an application to the Commission requesting authority to provide service to the Vogel sign while compensation is being determined. The area in question is within the city limits but is in the exclusive service territory of People's Cooperative Power Association (People's or the Cooperative).

On May 17, 1989, People's responded to the City's application and alleged that on or about May 12, 1989, the City extended its facilities approximately 130 feet to reach the lot line of the Vogel's property. People's charged that this is an illegal extension of service within its assigned exclusive service area, and should be referred to the Attorney General's Office for appropriate penalties.

The Commission considered these matters on July 5, 1989.

On July 7, 1989, the Commission issued its ORDER DENYING INTERIM SERVICE RIGHTS TO THE CITY OF ROCHESTER, AND REQUIRING THE CITY OF ROCHESTER TO SHOW CAUSE in this matter. That Order required the City to:

1. show cause why it should not be found to have knowingly and intentionally violated

Minn. Stat. §§ 216B.40 and 216B.44 (1988); and

2. show cause why this matter should not be referred to the Attorney General with a recommendation that it be subject to the maximum penalties under Minn. Stat. §§ 216B.57 and 216B.59 (1988).

The City filed its Response to the Order on July 17, 1989, admitting that the City had extended an underground secondary service line in the general area of the sign for which the City had applied to serve while compensation is being determined.

On that same date, the Department of Public Service (DPS or the Department) filed a Memorandum of Law addressing knowing and intentional violations of the law.

The Commission met on July 20, 1989 to consider this matter.

FINDINGS AND CONCLUSIONS

The Commission must determine whether the City had knowingly and intentionally violated Minn. Stat. §§ 216.40 and 216B.44 (1988) in extending its facilities 130 feet to reach the lot line of the sign property while interim service rights in this matter were being determined.

In its July 17, 1989 filing, the City noted that the Commission had recently addressed a similar complaint. In the Matter of an Application by the City of Rochester, Minnesota, for an Interim Service Order to Serve Certain Recently Annexed and Platted Undeveloped Land Within the City of Rochester Known as Viking Hills Third Subdivision and North Park Third Subdivision, E-299, 132/SA-89-136 (North Park Third). In North Park Third, the Commission found that although a violation of the statutes had occurred, it was not knowing and intentional and, therefore, the Commission did not refer the matter to the Attorney General. The City argued that the alleged violation in this matter occurred in the same time period and was less serious because no service was actually provided to the sign and urged the Commission to make a similar finding in this case.

Further, the City noted that the Commission's interpretation of Minn. Stat. § 216B.44 (1988) is currently under review in the Court of Appeals and the Commission should be tolerant of those who disagree with its interpretation of the statute while the question of the validity of the interpretation is undergoing judicial review. (North Park Third, Docket No. E-299, 132/SA-89-136 and In the Matter of a Complaint of People's Cooperative Power Association, Inc. Against the City of Rochester, Docket No. E-132, 299/SA-88-660). Finally, the City stated that it has tried to fully comply with the procedures required by the Commission in recent proceedings.

Minn. Stat. §§ 216B.40 and 216B.44 (1988) govern this proceeding. Minn. Stat. § 216B.40 (1988) establishes exclusive service areas for electric utilities. Minn. Stat. § 216B.44 (1988) provides that when a municipality which owns and operates a public utility extends its boundaries through annexation or consolidation, or extends its service territory within its existing boundaries, the

municipality shall thereafter provide electric service to these areas unless the area is already receiving service from an electric utility. If so, the municipality may purchase the facilities of the electric utility serving the area.

The statute sets guidelines for the purchase and sale of the facilities. If the municipality and the utility cannot agree on a purchase price, the statute provides that either can petition the Commission to determine the appropriate terms for the sale. The statute provides that after notice and hearing the Commission can determine the terms of the sale and lists factors for the Commission to consider in making its determination. Minn. Stat. § 216B.44 (1988) then states:

Until the determination by the commission, the facilities shall remain in place and service to the public shall be maintained by the owner. However, the electric utility being displaced, serving the annexed area, shall not extend service to any additional point of delivery with the annexed area if the commission, after notice and hearing, with due consideration of any unnecessary duplication of facilities, shall determine that the extension is not in the public interest.

Clearly, the displaced utility, People's in this case, had the right to serve the disputed area which is within its assigned service area until compensation has been determined and paid or until the Commission found that it was not in the public interest for People's to provide service to additional points of deliver in that area. Neither of these events had happened when Rochester extended its facilities to serve the sign owner's property. The Commission finds that Rochester did, in fact, extend electric service to an area it was not authorized to serve. This violates Minn. Stat. §§ 216B.40 and 216B.44 (1988).

The Commission notes that this service extension was made about the same time as the unauthorized service extension into the North Park Third Subdivision. In North Park Third, the Commission found that the City had violated Minnesota law and Commission Orders in extending service but concluded that the City's conduct did not meet the standard of a knowing and willful violation of Minnesota law or Commission Orders that would result in referral to the Attorney General for appropriate legal action.

The Commission makes the same findings here. At the time of the service extension to the Vogel sign, the City had misconstrued the Commission's interpretation of Minn. Stat. § 216B.44 (1988). The City has indicated that, while it may not agree with the Commission's interpretation, it does now understand it and has implemented procedures to avoid any further unauthorized service extensions. The Commission concludes that the City's action here does not meet the statutory standard of a knowing and willful violation of Minnesota law and will not refer this matter to the Attorney General for further legal action.

ORDER

1. The Commission hereby determines that the activities of the City of Rochester described above

do not constitute a knowing and intentional violation of Minn. Stat. §§ 216B.40 and 216B.44 (1988).

2. This Order shall become effective immediately.

BY ORDER OF THE COMMISSION

Mary Ellen Hennen
Executive Secretary

(S E A L)